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Supreme Court, U.S.
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No. 02-1796

In The

# Supreme Court of the United States

MARLIN DAVIS,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITIONER MARLIN DAVIS' SECOND SUPPLEMENTAL BRIEF

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## QUESTIONS PRESENTED

*Whether this Court should grant certiorari and remand for reconsideration in light of this Court's subsequent decision in Miller-El v. Cockrell.*

*OR*

*Whether a COA [Certificate of Appealability] should have been granted to consider the following issues:*

*1. Whether the sentence for conviction under a single-count indictment charging a conspiracy "to distribute controlled substances, that is cocaine, cocaine base (commonly known as crack cocaine) and marijuana" should be based on the controlled substance with the least penalty instead of the substance with the greatest penalty.*

*2. Whether ineffective assistance of counsel, by failure to object to the government's pervasive use of Petitioner's ethnicity to prove membership in a drug conspiracy, and to prejudice the jury by blaming "Jamaicans" (blacks of Jamaican national origin from the Miami area) of using and exploiting "Americans" (local North Florida blacks as were five of the jurors), violated Petitioner's constitutional rights.*

*3. Whether ineffective assistance of counsel, by failure (a) to seek a change of venue, (b) to use the opportunity afforded by the district court to conduct a meaningful voir dire of jurors for exposure to newspaper and television reports with extensive reference to Jamaicans and falsely accusing petitioner's brother and sole co-defendant at trial of being a "Drug King" responsible for the well publicized death of a state trooper, and (c) failure to prevent consequence of pretrial publicity from infecting the jury trial proceedings, denied Petitioner's constitutional right to fair trial.*

## PARTIES

Marlin Davis

Emerson Davis: Marlin Davis' brother and sole co-defendant at trial will file by mail on September 18, 2003 a Petition for Writ of Certiorari raising substantially the same issues.

Both are presently incarcerated.

## I. Second Supplemental Brief Filed Pursuant To Supreme Court Rule 15

The Petition for Certiorari was filed on May 23, 2003 and docketed on June 11th. On May 27, 2003, this Court decided *Bunkley v. Florida*, 123 S. Ct. 2020 (2003). The first Supplemental Brief concerned the Department of Justice's June 17, 2003 proclamation on ethnicity relating to the Second and Third Questions Presented.

The May 27th *Bunkley* decision concerns the petitioner's argument under the Sixth Amendment on page 16 of the Petition relating to the First Question Presented, and whether this Court should, or needs to, make *Apprendi v. New Jersey,* 530 U.S. 466 (2000) retroactive.

## II. Whether *Apprendi* Needs, or Should be, Retroactively Applied Under Principles Recognized in *Bunkley* to Petitioner's Sixth Amendment Argument

The district court rejected Marlin Davis's argument that the sentence based upon a general verdict for a drug conspiracy conviction involving multiple objects should be based on the substance with the least penalty. Instead, Mr. Davis was sentenced for the substance with the greatest penalty. The jury had not been instructed it must find guilt beyond a reasonable doubt for all three controlled substances in order to convict for a conspiracy to distribute controlled substances. The district court, in denying §2255 relief, determined Marlin Davis to be guilty beyond a reasonable doubt for all three controlled substances, and not a combination or one or more.

The Petition for Writ of Certiorari at page 16 stated:

> Marlin Davis was found guilty of a "drug conspiracy" involving "a controlled substance." The individual jurors all could have found "a drug conspiracy" with each juror finding a different controlled substance or a different combination of controlled substances. For the district court to hold that the Davis jury could not have done so violates due process under the Sixth Amendment. U.S. CONST., Amendment VI.

The violation of the Sixth Amendment would seem apparent under basic principals of constitutional law, including those underlying the rationale of *Apprendi,* whether or not *Apprendi* is applied retroactively by this Court. The district court ruling recognized that if this Court should make *Apprendi* retroactive it would be dispositive:

> In his motions for rehearing and resentencing, Davis argues that his sentence is invalid under *Apprendi v. New Jersey*, 530 U.S. at 466, a case decided after Davis's conviction and sentence were affirmed on appeal. Although he has not abandoned or withdrawn his argument that *Apprendi* should be made retroactive to his case, Davis now concedes that, because the Supreme Court has *not* made *Apprendi* retroactive, he is not entitled to relief under *Apprendi*. Doc. 1561 at 2. *See United States v. McCoy*, 266 F.3d 1245 (11th Cir. 2001) (holding that *Apprendi* does not apply retroactively to cases on collateral review and *Apprendi*-error does not constitute a jurisdictional defect), *cert. denied*, 122 S. Ct. 2362, 153 L. Ed. 2d 183 (2002).

Marlin Davis preserved the *Apprendi* issue in the motion for a COA before the district court and the court of appeals.[1]

In *Bunkley* this Court recognized that the application of retroactivity in a request for post conviction relief under state law may be constitutionally required. "[I]t has long been established by this Court that the Due Process Clause . . . forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." (123 S. Ct. at 2023, *citing Fiori v. White*, 531 U.S. 225.) Whether the *Apprendi* ruling constitutes a change in law that should be applied retroactively has not been determined by this Court.

This Court in *Bunkley*, as in *Fiori*, found it unnecessary to rule whether a constitutional retroactivity analysis was necessary.[2] Applying the rationale of *Bunkley* to the present proceeding, it would seem – if the principles underlying the Sixth Amendment were violated by the district court's finding on guilt in reference to the specific

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[1] *United States v. Marlin Davis*, Motion for Certificate of Appealability to the Eleventh Circuit, No. 02-15948-F, p.3: "(5) Whether the application of *Apprendi* should be made retroactive by the Supreme Court of the United States (requested to preserve the issue in event of future action by the Supreme Court)."

[2] The Florida Supreme Court in post conviction relief had refused to give retroactive effect of its 1997 ruling that a pocketknife with a 3 ¾ inch blade was not a prohibited weapon to a 1989 conviction concerning a 2½ to 3 inch blade. This Court remanded for determination whether Bunkley's pocketknife was within the exception at the time of his conviction. If so, there was no crime and no need for retroactive analysis.

objects of the conspiracy, then *Apprendi* retroactivity would not have to be proclaimed by this Court.

As noted, Marlin Davis concedes this Court has not made *Apprendi* retroactive, but the absence of this declaration should not allow the district court to violate the right to a jury trial by making post conviction finding of disputed facts. Rather than submitting interrogatories to the jury at trial, the court in essence served itself and answered special interrogatories for the purpose of denying relief under §2255. If the district court is correct that it can make such determinations in absence of this Court making *Apprendi* retroactive, this Court as a matter of Due Process should make *Apprendi* expressly retroactive for application under §2255.

At trial, Marlin Davis had been sentenced on the basis of crack cocaine without a jury determination of the amount of the substance. The magistrate and district judge initially denied Davis' §2255 request to be sentenced for the substance with the least penalty (marijuana) on the mistaken premise that government had not introduced evidence of marijuana to prove its case. Marlin Davis' objections to the magistrate's report and to the district court's initial ruling both included quoted record references of the government's marijuana testimony. (*See* Supplemental Appendix "J"). On rehearing (the September 24, 2001 denial of rehearing for §2255 relief), the district court then found the verdict to be unambiguous and that all three objects had been found by the jury, including marijuana. The district court's instructions did not require an individual finding of cocaine, cocaine base, and marijuana. The charged conspiracy under the instruction was to "distribute controlled substances." The jury was expressly instructed: "Section 841 makes it a crime for

anyone to knowingly distribute or possess to distribute a controlled substance."[3] The general jury verdict was a response to that charge.

The district court claimed this post conviction right to make findings of guilt beyond a reasonable doubt for each and every object of the conspiracy because *Apprendi* had not been made retroactive by this Court. For retroactive application to §2255 proceedings, *Apprendi* must be made retroactive by this Court, which it has not done to date. *Harris v. United States*, 536 U.S. 545, 581 (2002) ("No Court of Appeals, let alone this Court has held that *Apprendi* has retroactive effect." Thomas, J., dissenting).

If Due Process could require a state court in state court post conviction proceedings to give retroactive effect to a state court decision of constitutional dimensions, then the same Due Process clause could require this Court to make *Apprendi* retroactive. This is a question of great public interest and significance and should be considered by this Court upon granting the Petition for Writ of Certiorari.

Respectfully submitted,

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[3] *See* Petition for Certiorari at p. 14. The written jury instructions that were furnished to the jury were set out in document No. 976 in the original criminal proceeding.